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Nos. 96-843 & 96-847

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

NATIONAL CREDIT UNION ADMINISTRATION,
Petitioner,
and
AT&T FAMILY FEDERAL CREDIT UNION and
CREDIT UNION NATIONAL ASSOCIATION, INC.,
Petitioners,
v.
FIRST NATIONAL BANK & TRUST CO., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICI CURIAE* INDEPENDENT BANKERS ASSOCIATION OF AMERICA AND AMERICA'S COMMUNITY BANKERS IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether banks (and their trade associations), as competitors of Federal credit unions like AT&T Family Federal Credit Union ("AT&T FCU"), fall within the zone of interests to be protected by the Federal Credit Union Act ("FCUA"), and therefore have standing to challenge the National Credit Union Administration's ("NCUA's") violation of the "common bond" requirement of the FCUA.

2. Whether the NCUA's approval of a Federal credit union like AT&T FCUA's expansion of membership to the employees of multiple organizations, who have no common bond uniting all of them, violates the FCUA's express requirement that Federal credit union membership be limited to "groups having a common bond."

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BRIEF OF *AMICI CURIAE* INDEPENDENT BANKERS ASSOCIATION OF AMERICA AND AMERICA'S COMMUNITY BANKERS IN SUPPORT OF RESPONDENTS

Amici curiae the Independent Bankers Association of America ("IBAA") and America's Community Bankers ("ACB") jointly submit this brief in support of respondents, First National Bank & Trust Company, *et al.* This

brief is filed with the consent of all parties, which are on file with the Court.[1]

INTERESTS OF *AMICI CURIAE*

IBAA is a non-profit national trade association that exclusively represents the interests of the nation's community banks. The IBAA's nearly 6,000 national and state chartered member financial institutions are located in all 50 states and in the District of Columbia. IBAA members engage in all forms of lending to businesses and consumers.

ACB is the national trade association for 2,000 savings and community financial institutions and related business firms. The savings industry has more than $1 trillion in assets, 250,000 employees and 15,000 offices. ACB members have diverse business strategies based on consumer finance, housing, and community development.

Amici curiae jointly submit this Brief in order to express the support among the financial institutions they represent, for the respondents' challenge to the NCUA's action loosening restrictions on Federal credit union membership, and to emphasize the importance of this case to the entire financial services industry and to community banks and savings institutions in particular.

The members of IBAA and ACB are community-based, full service financial institutions. Their customers are individuals, small employers, college students, farmers, and others like them who are well and adequately served by these institutions. The NCUA, AT&T FCU and the many *amici* who have appeared on behalf of the credit union industry, argue that unless the Court reads the plain language of the statute to permit multi-employer groups to affiliate, employees of small businesses and other individuals will be denied access to comparable financial institu-

[1] No counsel for any party had any role in authoring this brief, and no person other than *amici curiae* made any monetary contribution to its preparation or submission.

tion services. Nothing could be further from the truth. All financial institutions, including credit unions, operate in a fiercely competitive marketplace, to the benefit of consumers who have a variety of products and services to choose from. Brokerage firms, mutual funds, insurance companies, banks, savings institutions and credit unions all compete for the same customers. Permitting credit unions to serve multiple unaffiliated groups has an enormous competitive impact on these other providers of financial services.

Credit unions originally were founded by individuals for the collective good of themselves and their neighbors who may not have had equal access to the banking system at the time. The common bond requirement—adopted to restrict credit unions to serving a small, local and well-defined group of members—was the glue that bound credit union members together in a cooperative venture.

However, credit unions that historically served such well-defined local groups, such as employees of a single company, now have been allowed to expand their charters to permit them to serve much of the general public over a wide geographic area. Credit unions have been allowed, indeed encouraged by the NCUA, to include under one umbrella an unlimited number of unrelated membership groups. Huge financial organizations, like AT&T FUA with its 150,000 customers and reported 560 subgroups, bear no resemblance to the credit unions authorized by Congress in the FCUA.

Since the late 1970's, credit union powers have been gradually and significantly expanded so as now to permit credit unions to offer the same range of consumer lending products, accounts, and services as banks and savings institutions to the same general population of consumers. It is important to note that as the authority of credit unions has changed and expanded, the traditional types of credit union customers also have changed and expanded. Today, the segments of the local community served by credit

unions are indistinguishable from those served by banks and savings institutions. Credit union customers are no longer primarily drawn from lower income groups. In 1995, the average U.S. household income was $36,740; the average household income for credit union members was $43,480. Seventy percent of credit union members owned or were buying homes in 1995. By comparison, only 62 percent of nonmembers owned homes. CUNA & Affiliates, Credit Union National Association, Inc., *National Member Survey*, at 10-11 (1996); *see also* General Accounting Office, *Credit Unions: Reforms for Ensuring Future Soundness*, at 231 (1991) ("There is no evidence that today's credit union members are for the most part 'of small means.'"). "The U.S. credit union industry has evolved from serving simple, short term consumer savings and lending needs, to being full-service consumer banks." A. K. Moysich, *An Overview of the United States Credit Union Industry*, FDIC Banking Review, Fall 1990, Vol. 3, No. 1, at 25 (1990). And, according to 1995 NCUA statistics, credit unions, compared to banks and savings associations, are the most likely to deny loan applications from low-income minorities. Of all loan denials by credit unions, 97.2% were from low-income minorities, compared with denials of 2.8% to low-income whites and Asians. *CUs Rated Worst Lenders to Minorities*, NCUA Watch (American Banker, Inc., Washington, D.C.) Oct. 21, 1996, at 1, 3.

Unlike full-service banks with whom credit unions now compete, however, credit unions are exempt from federal, state and local taxes on their income. This confers on credit unions a financial advantage averaging $.71 per $100 in deposits nationwide. For a typical $100 million community bank, this differential equates to a $710,000 annual financial competitive advantage for credit unions. This allows credit unions to accumulate additional capital to support asset growth, and their lower cost of funds allows them to pay higher interest rates on deposits and to charge lower interest rates on loans.

Unlike full-service banks, credit unions also are exempt from bank regulatory requirements like the Community Reinvestment Act ("CRA"). 12 U.S.C. § 2901 *et seq.* When Congress adopted CRA in 1977, it exempted credit unions because they were small institutions with a small amount of assets serving a small number of customers, and they had significant field of membership restrictions in place. However, today many credit unions are major financial institutions with tens of thousands of members and no practical restrictions on membership growth. A growing number of credit unions in recent years have dramatically increased their involveemnt in housing finance, becoming important players in the mortgage market, instead of relying on smaller balance consumer loans. According to the NCUA, credit union real estate loans in 1995 totaled $62.9 billion, or 32 percent of total loans. Search of Sheshunoff Information Services, Inc., Credit Unions, CD ROM (Dec. 1996). Credit unions made $8.37 billion in first mortgages in the first six months of 1996, more than double the $4 billion they made in the first half of 1995. And, as noted above, have a very poor record of minority mortgage lending. Jo McIntyre, *Boom in Mortgage Lending at CUs*, National Mortgage News (Faulkner & Gray, Inc., New York, NY) Oct. 21, 1996 at 1. Although credit unions currently function in a community like a bank or savings institution, they are not required to meet similar community investment standards.

Credit unions were established by Congress to permit individuals with a common employment or community bond to create limited purpose financial institutions to serve them and their common interests, and were given special tax and regulatory exemptions to assist them in furthering this goal. Congress did not intend to authorize multi-state, multi-billion dollar, tax-privileged, full-service financial institutions to unfairly compete with private financial institutions for customers in the general population. In section 109 of the FCUA, 12 U.S.C. § 1759, Congress spoke directly and precisely to this limitation by

imposing the "common bond" requirement, which now must be enforced.

SUMMARY OF ARGUMENT

Amici agree with the arguments made and authorities cited by respondents in support of respondents' standing, and with respect to the unlawfulness of the NCUA's actions.

The court of appeals properly held that respondents, as competitors of credit unions, have standing to challenge the NCUA's action approving the expansion of the membership of a Federal credit union to include innumerable, wholly unrelated groups. Pet. App. 26a.[2] The court of appeals' decision represents a straightforward application of the zone of interests test as this Court has applied it in a line of cases holding that "competitors of regulated entities have standing to challenge regulations." *Air Courier Conference v. American Postal Workers Union*, 498 U.S. 517, 529 (1991) (citing *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987); *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971); *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970)). In light of those precedents, the court of appeals' decision was correct.

The court of appeals' analysis of standing follows this Court's explanation of the zone of interests test. As the Court stated in *Clarke*, a plaintiff is not required to show that there was a "congressional purpose to benefit the would-be plaintiff." *Clarke*, 479 U.S. at 399-400. Thus, the court of appeals correctly reasoned that a plaintiff may have standing, even if the plaintiff is not the "intended beneficiary" of the statute at issue. Respondents' standing turns on whether respondents are members of a particular class of plaintiffs that Congress intended to be relied upon to challenge agency disregard of the law.

[2] References to "Pet. App." refer to NCUA Pet. No. 96-843.

Id. at 399. Persons that Congress intended to rely upon to challenge agency actions may fairly be described as "suitable challengers," as the court of appeals used that term. The court of appeals' reasoning thus is fully supported by this Court's jurisprudence on standing.

On the merits, the court of appeals properly applied the analysis specified in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to hold that NCUA's action was not in accordance with the FCUA. Pet. App. 2a. The plain language of section 109 of the FCUA, 12 U.S.C. § 1759, clearly conveys Congress' intent that all of the members of a Federal credit union share a single common bond. The legislative history of the FCUA and congressional and administrative statements made after the FCUA's passage further confirm the court of appeals' finding that the plain meaning of the statutory language prohibits a credit union's membership from being comprised of amalgams of wholly unrelated groups. The decision of the court of appeals therefore should be affirmed.

ARGUMENT

I. BANKS (AND THEIR TRADE ASSOCIATIONS), AS COMPETITORS OF FEDERAL CREDIT UNIONS LIKE AT&T FCU, FALL WITHIN THE ZONE OF INTERESTS TO BE PROTECTED BY THE FEDERAL CREDIT UNION ACT ("FCUA"), AND THEREFORE HAVE STANDING TO CHALLENGE THE NATIONAL CREDIT UNION ADMINISTRATION'S ("NCUA'S") VIOLATION OF THE "COMMON BOND" REQUIREMENT OF THE FCUA.

A. Respondents Have Standing To Challenge The NCUA's Action Under The Well Settled Zone Of Interests Test.

There is no dispute in this case that the respondents have suffered injury in fact as a result of the NCUA's grant of applications for expanded membership to un-

related occupational groups by AT&T FCU and other federal credit unions, and therefore satisfy the Article III standing requirement. Pet. App. 20a. However, Petitioners contend that the banks cannot claim prudential standing because they fail to qualify as a party "adversely affected by agency action within the meaning of the relevant statute." 5 U.S.C. § 702. As shown below, however, the respondents clearly satisfy the test for prudential standing to challenge the NCUA's actions.

A party meets the requisite standard for prudential standing if "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated." *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). This Court further articulated the "zone of interests" analysis in *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987), explaining, "The essential inquiry is whether Congress 'intended for [a particular] class [of plaintiffs] to be relied upon to challenge agency disregard of the law.'" *Clarke*, 479 U.S. at 399 (quoting *Block v. Community Nutrition Inst.*, 467 U.S. 340, 347 (1984) (alterations in original)). The Court did state that in cases such as the instant case, where the plaintiff is not itself the subject of the contested regulatory action, the plaintiff lacks standing if its interests "are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke*, 479 U.S. at 399. The Court expressly noted, however, that "there need be no indication of congressional purpose to benefit the would-be plaintiff." *Clarke*, 479 U.S. at 399-400 (citing *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971)).

Indeed, *Clarke* was simply one case in a "series of cases" in which this Court has held that "competitors of regulated entities have standing to challenge regulations." *Air Courier Conference v. American Postal Workers*

Union, 498 U.S. 517, 529 (1991) (citing *Clarke*, 479 U.S. 388; *Investment Co. Institute*, 401 U.S. 617; *Association of Data Processing Serv. Orgs., Inc.*, 397 U.S. 150). In *Clarke*, securities firms had standing to challenge the Comptroller of the Currency's ruling that national banks could operate out-of-state brokerage offices. In *Investment Co. Institute*, an association of mutual fund companies had standing to challenge the Comptroller of the Currency's decision that a bank could establish and operate a collective investment fund for managing agency accounts. In *Data Processing*, data processors had standing to challenge the Comptroller of the Currency's decision that national banks could make data processing services available to their customers.

The Court also could have cited *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970). In that case, travel agents had standing to challenge the Comptroller of the Currency's decision that banks could provide travel services to customers. *See also Panhandle Producers and Royalty Owners Ass'n v. Economic Regulatory Admin.*, 822 F.2d 1105, 1009 (D.C. Cir. 1987) (the court observed that "[c]ompetitors have a seemingly unbroken record of success in securing standing to challenge decisions involving agency licensing").

The instant case represents yet another challenge by competitors to a regulatory agency's decision in violation of the law limiting the activities of its regulated entities. The banks—competitors of the regulated entity AT&T FCU and other similarly situated federal credit unions—here challenge the NCUA's regulatory action as a violation of the statutory common bond requirement. The court of appeals correctly observed that the parallels between the banks' challenge in this case and the *Investment Co. Institute* and *Clarke* cases "are striking." Pet. App. 32a. Under the unbroken line of precedents recognized in *Air Courier Conference*, the respondents have

standing to bring this action. *Air Courier Conference*, 498 U.S. at 529.

Petitioners have cited only one case in which competitors of a regulated entity have been denied standing to challenge action by the regulatory agency harming their interests. Brief for the National Credit Union Administration ("NCUA Brief") 19 (citing *Branch Bank & Trust Co. v. NCUA*, 786 F.2d 621 (4th Cir. 1986), *cert. denied*, 479 U.S. 1063 (1987)); Brief for Petitioners AT&T Family Federal Credit Union and Credit Union National Association, Inc. (AT&T FCU Brief) 24-25 (citing *Branch Bank*). However, the court of appeals in this case properly concluded that *Branch Bank*, which was decided before *Clarke*, no longer has persuasiveness after *Clarke*. Pet. App. 24a n.3. Indeed, *Branch Bank* was inconsistent with the already settled precedent of this Court in that it failed to recognize that competitors of a regulated entity have standing to challenge the regulatory agency's loosening of restrictions. *See Investment Co. Institute*, 401 U.S. 617; *Arnold Tours*, 400 U.S. 45; *Data Processing*, 397 U.S. 150.

The cases chiefly relied upon by petitioners to support their argument that the respondents here do not meet the "zone of interests" test are clearly distinguishable from the instant case because they concerned challenges by plaintiffs whose interests were at best only marginally related to the purposes of the statute at issue. In *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990), the Court explained the scope of the zone of interests test by hypothesizing an action brought by a court reporter service challenging an agency's failure to conduct statutorily required hearings on the record. The Court stated that in such a case the court reporter service would lack standing, since the provision was meant to protect the interest of the parties to the proceeding. *Lujan*, 497 U.S. at 883. In *Air Courier Conference*, the Court held that

Postal Service employees did not have standing to challenge Postal Service regulations authorizing international remailing, which would have the effect of reducing work for the Postal Service employees. *Air Courier Conference*, 498 U.S. 517 (cited in NCUA Brief, at 24). Importantly, neither of these cases involved challenges by a competitor to agency decisions with respect to a regulated entity, and therefore are wholly irrelevant. Under controlling Court precedent in "strikingly similar" cases, respondents in this case are within the zone of interests to be protected by the FCUA and therefore have standing to challenge the NCUA's action.

B. The Court Of Appeals' Holding That The Banks And Their Trade Associations Have Standing Correctly Applies This Court's Decisions On Standing.

Petitioners assert that the court of appeals erred in concluding that the respondents, as competitors to credit unions, have standing because it referred to them as "suitable challengers." NCUA Brief 15. As discussed above, the court of appeals' holding that respondents have standing is mandated by established precedent of this Court applying the zone of interests test first articulated in *Data Processing*. Moreover, the specific route by which the court of appeals reached its conclusion, and its discussion of the "suitable challenger" analysis in this case, is wholly consistent with this Court's explanation of the prudential standing analysis.

The court of appeals' opinion refers to the suitable challenger analysis elaborated in a prior case. *See Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918 (D.C. Cir. 1989) (*HWTC IV*). In *HWTC IV*, the court held that a party may satisfy the zone of interests test either by being one of the intended beneficiaries of a statute or by having interests that coincide with the protected interests, *i.e.*, being a "suitable challenger." *HWTC IV*, 885 F.2d at 922. In this case, the court of appeals

found that respondents were suitable challengers, using *HWTC IV's* term, because this Court's decisions have made clear that competitors are suitable plaintiffs to challenge a regulatory decision applying market-defining statutes such as the one at issue here. Pet. App. 31a-37a.

The court's analysis is consistent with the zone of interests test. This Court's statement in *Clarke* that the essential inquiry is whether Congress intended for a particular class of plaintiffs to be relied upon to challenge agency disregard of the law compels application of the suitable challenger analysis. *See Clarke*, 479 U.S. at 399 (quoting *Block*, 467 U.S. at 347). Moreover, the development and application of the suitable challenger analysis is appropriate in light of the line of cases holding that "competitors of regulated entities have standing to challenge regulations." *Air Courier Conference*, 498 U.S. at 529. The court of appeals properly derived from that statement and the line of cases upon which it relies the principle stated in the opinion below:

> a plaintiff who has a competitive interest in confining a regulated industry within certain congressionally imposed limitations may sue to prevent the alleged loosening of those restrictions, even if the plaintiff's interest is not precisely the one that Congress sought to protect.

Pet. App. 33a.

Petitioners advance an improperly cramped view of the zone of interests test in asking the Court to reject the court of appeals' suitable challenger analysis. Petitioners argue that unless the banks' interests were specifically intended to be protected by Congress, the banks cannot meet this test. Citing *Bennett v. Spear*, 520 U.S. ——, 117 S. Ct. 1154, 1167, 137 L. Ed. 2d 281 (1997), NCUA argues that respondents must "demonstrate that Congress intended to protect the plaintiff's commercial interests in the statutory provision, the violation of which formed the

legal basis for the complaint." NCUA Brief 23. The statement quoted from *Bennett*, however, simply *describes the court's holding in Data Processing*, stating that Congress' intent to protect the complainants' commercial interest in that case was "sufficient" to satisfy the zone of interests test. *Bennett*, 117 S. Ct. at 1167. The statement does not purport to *prescribe a new test* to replace the established zone of interests test. The isolated statement in *Bennett* seized upon by the petitioners is wholly insufficient to challenge the court of appeals' analysis. Indeed, in *Bennett*, the Court held that ranchers were within the zone of interests to be protected in the section of the Endangered Species Act requiring agency decisions to be based on the best scientific and commercial data available, and therefore had standing to bring their claim. *Bennett*, 117 S. Ct. 1154.

The case in which this Court first enunciated the zone of interests standard, *Data Processing*, affords the better basis for considering the meaning of that test. The Court in that case held that standing turns on "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing*, 397 U.S. 153. The "*zone* of interests to be protected" clearly encompasses more than only the specifically intended beneficiaries of a statute, as indicated by the word "zone," and the plural "interests." As stated in *Clarke*, "there need be no indication of congressional purpose to benefit the would-be plaintiff." *Clarke*, 479 U.S. at 399-400 (citing *Investment Co. Institute*, 401 U.S. 617). The "suitable challenger" vocabulary developed and applied by the court of appeals appropriately describes those plaintiffs, like the respondents here, who have interests within the "*zone* of interests to be protected," beyond those entities that Congress intended to benefit.

II. THE NCUA'S APPROVAL OF A FEDERAL CREDIT UNION LIKE AT&T FCU'S EXPANSION OF MEMBERSHIP TO THE EMPLOYEES OF MULTIPLE ORGANIZATIONS, WHO HAVE NO COMMON BOND UNITING ALL OF THEM, VIOLATES THE FCUA'S EXPRESS REQUIREMENT THAT FEDERAL CREDIT UNION MEMBERSHIP BE LIMITED TO "GROUPS HAVING A COMMON BOND".

A. Congress Clearly Intended That Members Of A Federal Credit Union Share A Single Common Bond.

The decision in this case turns on the interpretation of Section 109 of the FCUA, enacted by Congress in 1934 to govern the chartering and regulation of Federal credit unions. 12 U.S.C. § 1759. Section 109 provides:

> Federal credit union membership shall consist of the incorporators and such other persons and incorporated and unincorporated organizations, to the extent permitted by rules and regulations prescribed by the [NCUA] Board, as may be elected to membership and as such shall each, subscribe to at least one share of its stock and pay the initial installment thereon and a uniform entrance fee if required by the board of directors; *except that Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district.*

12 U.S.C. § 1759 (italics and underscoring added). The critical phrase to be interpreted in that statutory provision is "groups having a common bond." The court of appeals correctly held that "the FCUA requires by its terms that all members of a credit union share a single common bond." Pet. App. 9a.

Judicial review of an agency's construction of a statute in an action under the Administrative Procedure Act, 5 U.S.C. § 706, is governed by the well settled rules established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The first question to be addressed is "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. Where Congress' intended meaning is clear, the Court's inquiry is at an end. In this case, as the court of appeals correctly held, Congress directly spoke to the precise question at issue and stated in the FCUA that the members of a Federal credit union must share one bond.

That conclusion is mandated by the plain language of the statute. The statute's phrase "a common bond" means what it says: one common bond. The court of appeals reached this conclusion, advanced by the respondents, by an alternative route, reasoning that the word "groups" in the statute implies a common bond among the members of the groups. Pet. App. 6a-7a. Both lines of reasoning support the conclusion that all members of a Federal credit union must have a common bond.[8] The existence of more than one reason compelling that same interpretation indicates that Congress' intent is abundantly clear. It does not, as petitioners contend, in any way suggest ambiguity in the language. The plain language of the phrase shows that Congress spoke directly to the precise question at issue here.

In addition to the express language of the phrase "groups having a common bond," the plain language of the subsequent parallel phrase "groups within a well-defined neighborhood, community, or rural district" further compels the conclusion that all of a Federal credit union's members must be united by a single common bond. Despite the virtually identical language and structure of the phrases "groups having a common bond" and "groups

[8] The question of whether a Federal credit union may have a membership composed of several groups all of whose members share a single common bond is not before the Court. NCUA approved AT&T FCU's expansion to include groups whose members are conceded to lack a single common bond.

within a well-defined neighborhood, community, or rural district," the NCUA has adopted different rules covering the two sections. The NCUA's regulations implementing the geographic limitation on membership require that all members of the Federal credit union live, worship, or work in "a single, geographically well-defined area where residents interact." 59 Fed. Reg. 29,066, 29,077 (1994). In a separate challenge to NCUA's interpretation of section 109 of the FCUA, the Court of Appeals for the Sixth Circuit found the common bond and the geographic limitation "share the same syntactical structure [and] ought to be interpreted consistently." *First City Bank v. NCUA*, 111 F.3d 433, 438 (6th Cir. 1997) (striking down the NCUA's interpretation of section 109). The court of appeals likewise correctly found that the same phraseology used in the statute cannot sensibly be read to mean two different things.

Respondent NCUA tries in vain to justify the contradictory readings of similar language in the same sentence of the statute by drawing a distinction between the participial phrase "having a common bond" and the prepositional phrase "within a well-defined neighborhood, community, or rural district." It is, however, a distinction without a difference. NCUA incorrectly contends that the participial phrase is merely "an example of a noun being *described*," while the prepositional phrase "*imposes a limit* on the noun." NCUA Brief at 31 (emphasis added). Participial phrases immediately following nouns without being set off by commas are "restrictive," and thus impose a limit on the noun to which they refer, just as do prepositional phrases. William Strunk, Jr. & E.B. White, *The Elements of Style* (3d ed. 1979).

NCUA goes so far as to state that "[i]n selecting a participial phrase to serve as the adjective to a plural noun, Congress necessarily created ambiguity." NCUA Brief at 32 n.12. Participial phrases do not suffer from that inherent defect, however. *The King's English*, cited

by NCUA, NCUA Brief at 31 n.11, does not suggest that participial phrases are necessarily ambiguous when referring to plural nouns. *See* H.W. Fowler & F.G. Fowler, *The King's English* (3d ed. 1931). That work discusses examples of the misuse of participial phrases due to the absence of or disagreement with the noun referent. The frequency of such "blunders" in English usage is irrelevant to the issue in this case, since the phrase, "groups having a common bond," properly links the participial phrase to the noun "groups."

It would have been possible for Congress easily to indicate clearly that several groups could form the membership of a Federal credit union without having a single common bond uniting all members if that had been Congress' intent. The simple phrase "groups having common bonds" might better support a reading of the statute that NCUA currently advances. Similarly, the language used by the NCUA in its 1989 revision of its field of membership policy includes clear language stating that "[a] select group of persons seeking credit union service from an occupational, associational or multiple group Federal credit union must have its own common bond. . . . The group's common bond need not be similar to *the common bond(s)* of the existing Federal credit union." 54 Fed. Reg. 31,168 (1989) (emphasis added) (cited in NCUA Brief at 8). NCUA's construction of the statutory phrase "a common bond" to mean "the common bond(s)" is patently inconsistent with the clearly expressed intent of Congress.

Petitioners' arguments focus only on the minutiae of the phrases in the statute, without taking into consideration whether Congress could have intended the statute to mean what NCUA now interprets it to mean. If section 109 of the FCUA requires only that each group have its own common bond, any limitation on Federal credit union membership would be illusory. Under petitioners' reading, the statute would permit a credit union to offer membership to every person in the United States who has a job,

if the credit union simply went through the process of listing every employer. Such a reading of the statute would make the common bond requirement meaningless.

The legislative history of the FCUA supports the court of appeals' interpretation of the plain language of the statute. Congressional statements concerning the purpose of the common bond requirement establish that Congress intended that the members of each Federal credit union be united by a single common bond. The Senate Banking Committee's report on the FCUA reveals the congressional definition of a credit union:

> A credit union is a cooperative society, organized in accordance with the provisions of a specific credit-union law, carefully supervised, self-managed, *limited in each case to the members of a specific group with a common bond of occupation or association* (such as the employees of a given industry, farmers in a given district, members of a church parish, employees of the United States Government, groups within a well-defined neighborhood, small community or rural district, etc.) . . . .

S. Rep. No. 555, 73d Cong., 2d Sess. 2 (1934) (emphasis added).

In addition, the bill's sponsor, Senator Sheppard, made statements during passage of the FCUA that support the court of appeals' interpretation of the statute. Senator Sheppard supplied an accompanying statement to S. 1639, which ultimately became the FCUA, that defined a credit union as "organized within and in each case limited to a specific group of people." 77 Cong. Rec. 3206 (1933). Similarly, during debate of the bill, he explained that "[c]redit unions are organizations of working people which enable members of a given group to have money . . . which is loaned to members of the individual group for provident purposes at normal interest rates." 78 Cong. Rec. 7259 (1934).

The legislative history of the FCUA makes it clear that Congress intended to establish Federal credit unions along the lines of credit unions as they had developed in a number of states. A credit union was a cooperative, owned and managed by members united in a common bond of association, occupation, or community. *See* J. Carroll Moody & Gilbert Fite, *The Credit Union Movement* (1971). Credit unions were not composed of numerous different groups unrelated by any single bond.

Further light on the contemporary understanding is shed by testimony to Congress by Roy F. Bergengren, the drafter of a model credit union act upon which the FCUA's common bond provision was based. His testimony is especially persuasive as to the meaning of the common bond requirement, since the NCUA itself has stated that Congress accepted Mr. Bergengren's views, and that the FCUA's use of the phrase common bond "embodied more or less Mr. Bergengren's description." National Credit Union Administration, *Studies in Federal Credit Union Chartering Policy* § II, at 12, 13 (July 1979). In his testimony to Congress, Mr. Bergengren described a credit union as "a cooperative bank, organized within and limited to a specific group of people." *Credit Unions: Hearings on S. 1639, S. 1640, S. 1641 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 73d Cong., 1st Sess. 31 (1933). *See also id.* at 15 ("every credit union is organized within a limited and given group of people"). The legislative history thus indicates that Congress intended that all the members of a credit union must share one common bond.

The intent of the common bond requirement as expressed in the legislative history of the FCUA makes it clear that the same common bond must apply to all members of a credit union. The legislative history of the FCUA clearly conveys that Congress saw the cooperation between members of a credit union as one of the most important distinctive attributes of credit unions. Credit

unions were intended to bring credit resources to the masses "on a cooperative basis." S. Rep. No. 555, 73d Cong., 2d Sess. 3 (1934). *See also* H.R. Rep. No. 2021, 73d Cong., 2d Sess. 1-2 (1934). Credit unions' ability to weather the storm of the Great Depression was attributed to their democratic control, honest management and "the worth of cooperative credit" generally. S. Rep. No. 555, 73d Cong., 2d Sess. 2-4 (1934). Congress believed that because of the cooperative nature of credit unions, they, unlike banks, could "loan on character." 78 Cong. Rec. 7259, 12,223 (1934) (statement of Rep. Luce).[4]

The existence of a single common bond uniting all the members of a Federal credit union is essential to promote cooperation between members. Credit unions with membership of wholly unrelated, disparate, and even competing, groups would not enjoy the cooperation of members that Congress saw as a defining element of credit union membership. The NCUA's approval of Federal credit union's expansion of membership to include unrelated groups does not merely ignore Congress' intent, but effectively flouts it. It is wholly unreasonable to believe that Congress could have intended to foster establishment of credit unions on a cooperative basis, while permitting membership to include groups having no reason to cooperate with one another.

Amicus curiae National Association of Federal Credit Unions in support of petitioners urges, however, that the Court should construe the FCUA to permit a credit union to include members lacking a single common bond, because, otherwise, individual credit unions would lack "the diversity in membership necessary to minimize risk and avoid the

[4] Congress' emphasis on cooperation among the members of a Federal credit union was reconfirmed by subsequent statements of Congress. *See* S. Rep. No. 814, 86th Cong., 1st Sess. 1 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2784 (the Senate Banking Committee stated, "Federal credit unions are cooperative associations [whose] membership is limited to a group of persons having a common bond of association, occupation, or residence").

adverse effects of a downturn in the business affairs of a single underlying company or business." Brief of *Amicus Curiae* National Association of Federal Credit Unions in Support of Petitioners ("NAFCU Brief") 27. That argument seeks to turn congressional intent completely on its head and reveals the basic contradiction at the heart of all of the petitioners' arguments. The legislative history nowhere evidences an intent by Congress to foster *diversity* among a single Federal credit union's members. As explained above, Congress plainly saw the *unity* of credit union members as the unique strength that had permitted credit unions to survive the Great Depression (which certainly occasioned a downturn in the business affairs of not a few companies). *E.g.* S. Rep. No. 555, 73d Cong., 2d Sess. 2-4 (1934); H.R. Rep. No. 2021, 73d Cong., 2d Sess. 1-2 (1934).

Whatever the advisability of fostering diversity among a credit union's membership, that is a decision for Congress to make. Congress in fact decided against it as expressed clearly in the language of the FCUA's common bond requirement. The court of appeals noted that NCUA's purpose in its 1982 rule change was "to enable each [Federal credit union] to realize economies of scale and *to facilitate occupational diversification* within the ranks of its membership." Pet. App. 4a (citing Letter to Fernand J. St. Germain dated October 28, 1983 from E.F. Callahan, Chairman, National Credit Union Administration 8-9, Joint App. 44). However, the NCUA's decision to foster diversity among the membership of each Federal credit union impermissibly violates Congress' express command that the membership of each Federal credit union must be united by a common bond. Indeed, there is no evidence that Congress intended to authorize the establishment of any Federal credit union that lacked the essential, defining attribute of a single common bond uniting all members within a single group of people. Nowhere in the legislative history of the FCUA is there a reference to any credit union composed of unrelated groups of mem-

bers. The legislative history instead compels the conclusion that the statute means what it says, all members of a Federal credit union must share one common bond.

B. Congressional And Administrative Statements Over Five Decades Confirm That The FCUA Requires That The Members Of A Federal Credit Union Must Have A Single Common Bond.

For nearly fifty years, the NCUA consistently interpreted the FCUA to require that all the members of a Federal credit union be united by a single common bond. *E.g.*, 45 Fed. Reg. 8280, 8285 (1980); *see also* General Accounting Office, *Credit Unions: Reforms for Ensuring Future Soundness*, at 219 (1991). In seeking to understand statutory language, it is customary to attend to the construction adopted by the agency administering that statute promptly after its enactment. *See Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 648 n.26 (1978); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 314-15 (1933). The long-standing constructions, adopted by the NCUA's predecessor regulator prior to the 1982 policy change, clearly supports the respondents' position. It should further be noted that when the NCUA adopted its new policy in 1982, it provided no explanation for its decision to change its interpretation of the statute. *See* 47 Fed. Reg. 16,775 (1982). However, the NCUA's chairman conceded at the time that the multiple common bond policy represented "the most significant deregulation" of credit unions because it allowed economic diversification. General Accounting Office, *Credit Unions: Reforms for Ensuring Future Soundness*, at 57 (1991).

Congress has never wavered in its interpretation that section 109 of the FCUA requires a single common bond among all the members of a Federal credit union. Rather, Congress has on numerous occasions expressly reaffirmed its intent that Federal credit union membership be limited

to members sharing one common bond. In 1948, for example, the House Committee on Banking and Currency described Federal credit unions in the following terms: "Membership in a particular Federal credit union is limited to a group having a common bond of occupation, or association, or a group within a well-defined neighborhood, community, or rural district." H.R. Rep. No. 1791, 80th Cong., 2d Sess. 1 (1948), *reprinted in* 1948 U.S.C.C.A.N. 2172, 2172 Add. 583. Again, in 1959, the Senate Banking Committee stated, "Federal credit unions are cooperative associations . . . . Membership is limited to a group of persons having a common bond of association, occupation, or residence." S. Rep. No. 814, 86th Cong., 1st Sess. 1 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2784.

Even more recent statements by Congress are in accord with the consistently expressed interpretation of section 109 of the FCUA as requiring members of a Federal credit union to have a single common bond. *See* H.R. Rep. No. 23, 95th Cong., 1st Sess. 6 (1977), *reprinted in* 1977 U.S.C.C.A.N. 105, 110 (credit unions are organized around the concept of "people of close common interests joining together for the economic benefit of that group of persons"); S. Rep. No. 487, 94th Cong., 1st Sess. 8 (1975) ("[c]redit unions are distinguished from other depository institutions by the common bond of their customers. Credit unions serve individuals who are affiliated by a 'common bond' of employment . . . ."); S. Rep. No. 1265, 90th Cong., 2d Sess. 2 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2469, 2470 ("[n]o individual may belong to a credit union or borrow from a credit union unless he is within the common bond concept of that credit union"). Taken together, these statements represent a long tradition of congressional understanding that the common bond requirement means all members of a Federal credit union must share a single common bond.

In light of that background, the fact that Congress has not moved to repudiate the NCUA's changed interpreta-

tion of section 109 of the FCUA cannot be read as supporting the NCUA's action. Congressional silence is an unreliable guide to congressional intent since, as this Court has stated, "Congressional inaction frequently betokens . . . preoccupation, or paralysis." *Zuber v. Allen*, 396 U.S. 168, 185-86 n.21 (1969). The better guides to Congress' intent are the plain language of the statute, the contemporaneous legislative history, and the subsequent affirmative statements by Congress that it understands section 109 of the FCUA to require all members of a Federal credit union to share one common bond.

Because Congress' intent on the precise question at issue in this case is clear, the Court's inquiry is at an end. *Chevron*, 467 U.S. at 836-837. No deference is to be accorded to an agency's misunderstanding of Congress' unambiguously expressed intent.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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